



September 26, 2001

Mr. Brett Bray
Division Director
Motor Vehicle Division
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR2001-4316

Dear Mr. Bray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152465.

The Texas Department of Transportation (the "department") received a request for the following information:

1. All available records relating to licenses issued to two of the Motor Vehicle Division's licensees; and
2. All records, including licensing information and broker bonds, on the same two automobile dealers.

You inform us that the department has released some of the responsive information to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.130 of the Government Code, and under Texas Rule of Civil Procedure 192.5.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹ We note that, although you do not argue that the property or privacy rights of a third party may be implicated by the release of the requested information, you notified the two licensees whose information is responsive to the request, of the request pursuant to section 552.305 of the Government Code. *See also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). The §552.305 notice informs each third party that it may submit to the attorney general, within ten days of receiving the notice, its reasons why the information in question should be withheld. The third parties did not respond to this notice or otherwise submit any arguments against disclosure of the requested information.

We first note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

You assert that social security numbers of applicants for a license issued by the department are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions such as section 51.251 of the Occupations Code. The relevant footnote to that statute reads:

[t]he social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specified occupation or profession that is provided to the licensing agency is confidential and is not subject to disclosure under the open records law.

Occupations Code § 51.251. The social security numbers at issue here belong to applicants for or holders of licenses issued by the department. Accordingly, we find that the social security numbers fall under section 51.251 of the Occupations Code as encompassed by section 552.101, and therefore must be withheld.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common law privacy, *see* Open Records Decision Nos. 600 (1992), 545 (1990). The submitted documents include a small amount of personal financial information which is protected from disclosure under common law privacy. We have marked this information. The remainder of the submitted information is not afforded protection under common law privacy. *See* Open Records Decision No. 620 (1993) (a corporation has no common law privacy interest in its financial information).

You also claim that drivers' license numbers, vehicle identification numbers, and dealer plate numbers contained within the submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

The department must withhold the Texas driver's license numbers, vehicle identification numbers, and license plate numbers, including dealer plate numbers, under section 552.130.

You further claim that a portion of the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You state that the Texas Motor Vehicle Board (the "Board") is authorized to investigate complaints concerning violations of the Motor Vehicle Commission Code. *See* V.T.C.S. art. 4413(36), § 3.05(a) (Vernon Supp. 2001). Proceedings conducted by the Director of

the Board are subject to the APA. *See* V.T.C.S. art. 4413(36), § 3.08(a). You state that the Enforcement Section is pursuing an active case against Swift Auto Sales for violations of the Motor Vehicle Commission Code. *See id.* Therefore, based on your representations and our review of the submitted information, we conclude that you have demonstrated that the department is involved in litigation with Swift Auto Sales. Accordingly, the first prong of section 552.103 has been satisfied. We also find that you have adequately explained how the submitted information relates to the subject matter of the litigation. Accordingly, the second prong of section 552.103 has been satisfied. However, once information has been provided to all parties to the litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we have marked the information that the department may withhold from disclosure pursuant to section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

Finally, you request that this office issue a previous determination allowing the department to withhold social security numbers, driver's license numbers, dealer plate numbers, leases, financial information, telephone verifications, and copies of checks contained in the files of the Motor Vehicle division of the department. We decline to issue such a previous determination at this time.

To summarize, the department must withhold social security numbers under section 52.251 of the Occupations Code as encompassed by section 552.101; Texas driver's license numbers, vehicle information numbers, and license plate numbers under section 552.130; and the information we have marked under section 552.101 in conjunction with common law privacy. We have marked the information that the department may withhold from disclosure pursuant to section 552.103. The remainder of the requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must

²As section 552.103 is dispositive, we do not address your claims under sections 552.107 and 552.111.

appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 152465

Enc. Submitted documents

c: Ms. Sylvana Boyce
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(w/o enclosures)